On the decriminalisation of homosexuality in India

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With its judgment of 6 September 2018 (*Navtej Johar v Union of India*), the Indian Supreme Court has put an end to the criminalisation of same-sex acts between consenting adults, allowing the country's LGBT+ community to celebrate a long overdue win after a nearly two decades lasting fight for legal recognition. The law in question, Section 377 of the Indian Penal Code (IPC), introduced in the 19th century under British colonial rule criminalised "carnal intercourse against the order of nature" codifying the prevailing Victorian zeitgeist of the time. Despite the text's vagueness, the law was commonly applied to homosexuality in general. In the offence, no distinction between consensual and non-consensual sexual relations were made, perverting homosexuality in its entirety as a result.

The first challenge to Section 377 was first raised vis-a-vis its constitutionality all the way back in 2001, when the Naz Foundation Trust, a non-governmental organisation filed a writ petition before the Delhi High Court. The High Court dismissed the petition on the grounds that the petitioners had no *locus standi* in the matter. The Naz Foundation Trust successfully appealed the decision before the Supreme Court which instructed the lower court to reconsider the case. This eventually led to the High Court reading down Section 377, specifically decriminalising consensual homosexual acts in 2009. Although the government at the time did not seek an appeal to this decision, which suggested its support, *challenges were successfully brought by religious groups and, curiously one astrologer, ultimately leading to its recriminalisation in 2013 by the Supreme Court in Suresh Kumar Koushal v. Naz Foundation.*

Koushal relied mainly on two arguments: (1) Courts must exercise judicial restraint when reading down legislation, since legislative parliamentary acts enjoy the presumption of constitutionality, (2) the High Court relied too heavily on international precedent and overlooked to analyse the question of applicability in an Indian context, citing the reason that only "a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders."

It took another four years and an unrelated Supreme Court ruling on the right to privacy to bring the case anew before the Supreme Court. Last year, in *KS Puttaswamy and others v. Union of India,* the Supreme Court held in a unanimous nine-judge decision that "privacy is an intrinsic part of life [and] personal liberty" and entitled "to protection as a core of constitutional doctrine" (paragraph 158). Apart from being a historic judgment in its own right, *Puttaswamy* decisively pathed the

way for a re-examination of its largely criticized *Koushal* decision of 2013 (paras. 118-128).

By the now issued *Navtej Johar* ruling, the Supreme Court ultimately declared Section 377 of the Indian Penal Code to be unconstitutional "in so far as it criminalises consensual sexual conduct between adults of the same sex". The verdict acknowledged that members of the LGBT+ community are entitled to rights under Article 14 (equality and equal protection of laws), Article 15(1) (non-discrimination), Article 19 (1)(a) (freedom of expression) and Article 21 (life and personal liberty) of the Indian constitution. Further, the bench delivered four separate but concurring judgments approaching the issue from different perspectives. Yet all of them carry the overarching common themes of constitutional morality, transformative constitutionalism, and the conviction that majoritarian concepts cannot be a ground to deprive minorities their fundamental rights. Reiterating its earlier case-lax, the Court held that the transformative nature of the Constitution stems from a dynamic and purposive interpretative approach which allows the constitution to adapt to ever-changing circumstances. Constitutional courts have a special role to play in this process by "[striving] to breathe life into the Constitution and not render the document a collection of mere dead letters" (paragraph 84). Hereby, the Court clearly quashed the formerly made argument in *Koushal* that legislative parliamentary acts enjoy the presumption of constitutionality.

The concept of constitutional morality has been used prominently in the *Naz Foundation* case of 2009, which led to the decriminalisation of homosexuality until the inglorious *Koushal* judgment recriminalized homosexuality in 2013. Contrasting popular and constitutional morality, the Delhi High Court in 2009 found in *Naz Foundation*:

"…[P]opular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality…In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view."

Not being mentioned expressly in the constitution, the notion of 'constitutional morality' on which *Navtej Johar* heavily relies, remains unclear. Although all four justices agree on the point that the constitution embodies certain values which are to be read into its articles, the exact formulation of its content differs from one another. Be that as it may, according to the Court, constitutional morality remains "the soul of the Constitution", and the "driving factor in determining the validity of Section 377" and "always trumps any imposition of a particular view of social morality by shifting and different majoritarian regimes (paragraph 81)."

Apart from being a lesson in transformative constitutionality and morality, the effects of *Puttaswamy* and the newly vindicated right to privacy radiate through the judgment. Accordingly, the Court holds that "while testing the constitutional validity of Section 377 IPC, due regard must be given to the elevated right to privacy as has been recently proclaimed in *Puttaswamy* (paragraph 149)," and that "the challenge to the vires of Section 377 IPC has been stronger than ever (paragraph 168)."

In *Puttaswamy*, the Supreme Court famously quashed the formerly made arguments on which *Koushal* heavily relied, showing support for the decriminalisation of homosexuality. Tested against the backdrop of the newly established right to privacy, the Court held in *Navtej Johar* that

"the right of privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to Constitutional rights and the Courts are often called up on to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. One's sexual orientation is undoubtedly an attribute of privacy (paragraph 647)."

The reaffirmed right to privacy right and the decriminalisation of same-sex acts between consenting adults raises the subsequent question, of how the legal recognition of same-sex couples could be furthered?

An intriguing answer can be found in the article "The Right to Relate: A Lecture on the Importance of "Orientation" in Comparative Sexual Orientation Law" by Prof. Kees Waaldijk from Leiden University. Holding the university's chair in Comparative Sexual Orientation Law, Waaldijk seeks to find a "concept with which to understand sexual orientation law and its development" and proposes "the right to relate".

First established by the European Commission of Human Rights in 1976, Waaldijk finds that the "right to establish and develop relationships has been recognized as one aspect of the human right to respect for one's private life." His thesis is

"(…) that the right to establish and develop relationships can be seen as a common denominator to all main phenomena in the field of sexual orientation law. This is so because sexual orientation is all about relating to others. Sexual orientation is about intimate behaviour between people, about amorous relationships between people, and/or about attraction to people: people of the same gender, people of different gender, people of any gender."

In other words, "the right to relate" allows to view legal issues that evolve around sexual orientation through a relational lens. The ability of an individual to relate to other individuals of the same sex and to maintain relationships can be linked to phenomena such as the decriminalization of homosexuality, same-sex parenting, non-discrimination laws and sexuality-based asylum claims.

Coming back to the recent decriminalisation of homosexuality in India, we see that the link between the right to privacy and the right to establish and to develop relationships did already find its way into paragraph 48 of the *Naz Foundation* case of 2009 in which the Delhi High Court struck down Section 377:

"(…) The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem, build relationships of his or her choice and fulfil all legitimate goals that he or she may set (….)."

However, further evolving the legal recognition of same-sex relationships through "the right to relate ", remains an opportunity yet to be seized by the Indian Supreme Court.

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